In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-837

RALPH DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On June 2, 1971, petitioner was indicted for conspiring to traffic in narcotic drugs in violation of 21 U.S.C. (1964 ed.) 173 and 174. The indictment charged four overt acts, three occurring before May 1, 1971, and the last on May 17, 1971 (Pet. App. B). On January 20, 1972, after three days of a jury trial in the Southern District of New York, during which the government presented testimony on events occurring only before May 1, 1971, petitioner changed his plea to guilty (Tr. 2). No evidence had been offered that the conspiracy extended beyond May 1, 1971.

On March 6, 1972, petitioner was sentenced to ten years' imprisonment and fined $20,000 under 21

U.S.C. (1964 ed.) 174, which required at least a five-year sentence, and 26 U.S.C. (1964 ed.) 7237(d), which prohibited the grant of probation, parole, or suspension of sentence, for violations of 21 U.S.C. 174. Both Section 174 and Section 7237(d) had been repealed effective May 1, 1971, by Section 1101 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, Title III, 84 Stat. 1291, 1292. The court of appeals affirmed (Pet. App. A), in part following the First Circuit's decision in *United States* v. *Bradley*, 455 F. 2d 1181, certiorari granted, 407 U.S. 908 (No. 71-1304), argued on January 8, 1973, and holding that both the general saving statute, 1 U.S.C. 109, and the specific saving statute in the 1970 Act operated to preserve the applicability of Section 174 and Section 7237(d) to conduct committed while these sections were in force.

Prior to accepting petitioner's guilty plea the court inquired whether he was aware of the punishment applicable in his case, and petitioner responded that it was a minimum of five years' imprisonment (Tr. 6). Government counsel interjected that he wished to inquire through the court whether, although the issue was being litigated in the *Fiotto* case,[1] petitioner was

[1] *United States* v. *Fiotto*, 454 F. 2d 252 (C.A. 2), certiorari denied, 406 U.S. 918, No. 71-1114. The instant case involves activities allegedly taking place between petitioner and Fiotto and others (Tr. 5). Petitioner stated that he was aware the same judge had also sentenced Fiotto and that he knew what Fiotto's sentence was (Tr. 7). (The sentence in *Fiotto* under 21 U.S.C. 174 and 26 U.S.C. 7237(d) was affirmed.) Petitioner also then assured the judge he "was taking a chance on what the sentence is" (Tr. 8). Petitioner's objection to sentencing under the old law was raised only after his sentence had been imposed (March 6, 1972, Tr. 14).

aware he would not be eligible for parole (Tr. 6). Petitioner and his counsel each responded that petitioner was aware of that fact (Tr. 6); when the court repeated the inquiry, petitioner affirmed his awareness (Tr. 6). In accepting the guilty plea, the judge also inquired of petitioner whether the testimony at trial described what had occurred, and petitioner replied "That's right" (Tr. 7). Then the judge had the charges read to petitioner, omitting, however, the fourth overt act, which had occurred after the repeal of 21 U.S.C. 173, 174 and which the judge therefore declared "out of the scope of the indictment" (Tr. 9-11). The judge inquired whether petitioner understood the charges that had been read and wished to change his plea (Tr. 11). Petitioner responded that he wished to plead "guilty" (Tr. 11).

1. The first issue raised by the petition concerning the retrospective reach of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is similar to the issues raised in *Bradley*, now awaiting decision by this Court.[2] But petitioner received twice the minimum sentence required by former Section 174 (but less than the 15-year maximum permitted under the new law, 21 U.S.C. 841(b)) and there is no indication that the judge would have placed him on probation or suspended his sentence if these alternatives had been available. In addition, if any parole is available, petitioner would not be eligible for consideration until he has served at least one-third of his ten-year sentence. See 18 U.S.C. 4202. By that time, the decision in *Brad-*

[2] Petitioner filed an *amicus* brief in *Bradley*.

ley will presumably have settled the question whether petitioner is eligible for parole. Nevertheless, even though it is difficult to see how a decision in *Bradley* could affect petitioner's sentence, the Court may wish to defer disposition of the present petition pending decision in *Bradley*.

2. Petitioner makes two contentions that do not turn on the decision in *Bradley*. His alternative contentions are (a) that since the conspiracy overlapped the May 1, 1971, effective date of the new Drug Abuse Act, the no-parole, no-probation, and no-suspension-of-sentence provisions of former Section 7237(d) should not be applicable to him in any event, and (b) that the district court lacked jurisdiction under 21 U.S.C. (1964 ed.) 173 and 174 because one of the overt acts occurred after the adoption of the new Act. Both of these contentions misconceive the nature of the offense of conspiracy, and were properly rejected by the court below in an opinion on which we mainly rely. It is well-established that a conspiracy is a continuing offense, in which, from its inception until it has been terminated or accomplished, each conspirator is continuously offending "as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence". *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Hyde* v. *United States*, 225 U.S. 347, 369.[3] There is therefore no merit

[3] That a conspiracy is a continuously occurring violation is also demonstrated by its capacity to create various places of venue and jurisdiction during its pendency, *Hyde* v. *United States*, *supra*, and to render all the conspirators liable for acts committed in furtherance of the agreement by any one of them, *Pinkerton* v. *United States*, *supra*; *United States* v. *Kissel*, 218

to petitioner's contention that the allegation in the indictment that the conspiracy continued after the effective date of the new statute deprived the court of jurisdiction to try him under the former statute for his violation of it. Trial and sentencing under 21 U.S.C. (1964 ed.) 173 and 174 were particularly appropriate here, since most of the conspiracy charged, and all that was proved before petitioner pleaded guilty, occurred prior to repeal. The trial court considered the post-repeal overt act to be "out of the scope of the indictment" (Tr. 9–11).

Similarly, petitioner's contention that the application of the old law's penalties to him is inconsistent with cases allowing [4] and a case requiring [5] the imposition of penalties which become applicable in mid-conspiracy is not well taken. Since the offense continues throughout the conspiracy, a change in the governing statute during the course of the conspiracy simply means that offenses have been committed under both statutes: it does not give petitioner any special

---

U.S. 601, 607–608. Neither result would be possible if conpiracies "occurred" only at the moment of the commencement or, as petitioner contends in order to bring himself exclusively within the new Act, at the moment of their termination.

[4] *E.g.*, *Huff* v. *United States*, 192 F.2d 911 (C.A. 5), certiorari denied, 342 U.S. 946 (application of statute imposing *greater* penalty does not violate prohibition on *ex post facto* laws); *United States* v. *Jackson*, 94 F.Supp. 912 (E.D.S.C.) (trial court properly applied penalties of later statute).

[5] *Leyvas* v. *United States*, 371 F.2d 714 (C.A. 9). There, the conspiracy bracketed the effective date of 21 U.S.C. (1964 ed.) 173 and 174, and the court held that therefore the new five-year mandatory minimum sentence applied. There, as here, the conspiracy was punished under 21 U.S.C. (1964 ed.) 173 and 174 because it existed while the statute was in force.

standing to insist on being charged only with the less severely punishable violation, and indeed the cases on which he relies involve the application of *more* serious penalties that became effective during the commission of the conspiracy. As the court below noted, "[t]he fact that he continued in violation of the law for an additional few weeks should not be grounds, absent explicit congressional authorization, for him to demand a more lenient sentence as of right" (Pet. App. 26).

For the foregoing reasons and for those urged in *Bradley*, we respectfully submit that petitioner has been validly sentenced.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973